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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ARNULFO CASTRO-JUAREZ, Defendant and Appellant.	A126977 (Marin County Super. Ct. No. SC164919A)

Arnulfo Castro-Juarez appeals from his conviction, following a plea of no contest, of one count of hit and run resulting in injury (Veh. Code, § 20001[1]) and one count of driving while having .08 percent or more of alcohol in his blood, causing injury (§ 23153, subd. (b)) with an enhancement for inflicting great bodily injury (Pen. Code, § 12022.7, subd. (a)). Appellant's counsel filed an opening brief in which he raises no issues and asks this court for an independent review of the record. (*People v. Wende* (1979) 25 Cal.3d 436, 441-442.) Appellant was notified of his right to file a supplemental brief on his own behalf but has not filed one. Because our independent review reveals no meritorious issues, we affirm the judgment.

FACTS

On June 7, 2009, appellant drove while under the influence of alcohol and lost control of his vehicle. Appellant fled, telling a witness to say nothing about the accident and leaving injured passengers David Veliz and Esgar Cifuentes at the scene. Cifuentes

[1] All further statutory references are to the Vehicle Code unless otherwise indicated.

was transported to the hospital with numerous facial fractures, a fractured skull, bleeding in the brain, various lacerations and a collapsed lung. Veliz suffered injuries to his head and face.

After Veliz indentified appellant as the driver, police contacted appellant and administered a field sobriety test, which he failed. After he was arrested, officers found a bindle of cocaine in his pocket, and discovered that he did not have a valid driver's license. Appellant has three prior citations for driving without a license and has failed to pay fines and appear in court with respect to those citations.

APPELLANT'S PLEA AND SENTENCING

In an eight-count complaint on June 8, 2009, appellant was charged with driving under the influence of alcohol, causing injury (§ 23153, subd. (a), counts one and two) and driving while having .08 percent or more of alcohol in his blood (DUI), causing injury (§ 23153, subd. (b), counts three and four). As to those charges, it was further alleged that appellant caused bodily injury to more than one victim (§ 23558), that appellant inflicted great bodily injury on Esgar Cifuentes (Pen. Code, § 12022.7, subd. (a)), and that appellant had a blood alcohol level of .24 percent (§ 23578). In addition, appellant was charged with hit and run resulting in injury (§ 20001, count five); dissuading a witness from reporting a crime (Pen. Code, § 136.1, subd. (b)(1), count six); possession of cocaine (Health & Saf. Code, § 11350, subd. (a), count seven); and driving without a valid driver's license, a misdemeanor (§ 12500, subd. (a), count eight).

On September 30, 2009, appellant pled guilty to counts three, four and five and admitted the great bodily injury allegation in exchange for the other counts being dismissed with a *Harvey* waiver[2] and an indicated maximum sentence of six years and eight months in prison and up to $10,000 restitution. On November 3, 2009, the guilty plea to count four was withdrawn and that count was dismissed with a *Harvey* waiver

[2] *People v. Harvey* (1979) 25 Cal.3d 754, 758-759. (Cf. *People v. Bustamante* (1992) 7 Cal.App.4th 722, 725 [a sentencing judge may not consider the facts underlying counts dismissed pursuant to a plea bargain, unless the defendant expressly agrees to the contrary].)

under *Wilkoff v. Superior Court* (1985) 38 Cal.3d 345, 353, which holds that a defendant cannot be convicted of multiple counts for one instance of driving under the influence, even if there are multiple victims.

Prior to accepting the plea, the court advised appellant of the constitutional rights he would be waiving and found that the change of plea was knowing and voluntary. The court explained the significance of the *Harvey* waiver to appellant and he indicated that he understood. There was a factual basis for the plea.

In determining appellant's eligibility for probation, the court found several unfavorable factors relating to the crime and to appellant: the nature and circumstances of the crime were serious as compared to other instances of the same crime (Cal. Rules of Court, rule 4.414(a)(1)[3]); appellant inflicted severe injury on Cifuentes (rule 4.414(a)(4)); as a result of his injury, Cifuentes suffered great monetary loss (rule 4.414(a)(5)); and appellant was an active participant in the crime (rule 4.414(a)(6)). The court found that the unfavorable factors outweighed the favorable factors, which included the negative effect that imprisonment would have on appellant's family (rule 4.414(b)(5)), the adverse collateral consequences a felony conviction would have on appellant's life (rule 4.414(b)(6)), and appellant's remorse (rule 4.414(b)(7)). Though appellant has a minimal criminal record (rule 4.414(b)(1)) and indicated a willingness to comply with the conditions of probation (rule 4.414(b)(3)), the court found that appellant's history of driving infractions and unpaid fines suggested a failure to take responsibility for his actions and a low likelihood of success on probation. Accordingly, the trial court denied probation.

In calculating appellant's sentence, the court found the factors in aggravation[4] outweighed those in mitigation[5] and imposed the high term sentence on each count for an

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[3] All further references to rules are to the California Rules of Court.

[4] The court found the following aggravating factors pursuant to rule 4.421(a)(1), (6), (9) & (b)(1): the crime involved violence and great bodily injury, appellant interfered with the judicial process by dissuading a witness from talking to police, the offense involved damage of great monetary value, and appellant engaged in violent conduct that indicates a danger to society. The court also considered the fact that

aggregate sentence of six years and eight months in prison. The court awarded appellant 150 days credit for time served, plus 37 days conduct credit and 37 days work credit, for a total of 224 days. Appellant was ordered to pay $1,400 restitution (Pen. Code, § 1202.4, subd. (b)(1)), an additional suspended restitution fine in the same amount (Pen. Code, § 1202.45), and $60 in court security fees (Pen. Code, §1465.8).

Appellant's counsel submitted a motion requesting the court recall the sentence and impose a lesser sentence pursuant to Penal Code section 1170, subdivision (d). Placing great weight on appellant's minimal criminal history (rule 4.423(b)(1)), the court resentenced appellant to the midterm for both counts: three years for his DUI causing injury conviction (§ 23153, subd. (b)) and eight months (one-third the midterm pursuant to Pen. Code, § 1170.1, subdivision (a)) for his hit and run resulting in injury conviction (§ 20001). The court imposed an additional three years for the great bodily injury enhancement (Pen. Code, § 12022.7) and applied all other previously imposed conditions, including fines, fees, and parole.

On March 1, 2010, appellant filed a timely notice of appeal without a certificate of probable cause.

DISCUSSION

Without a certificate of probable cause, review in this case is limited to noncertificate issues. *People v. Mendez* (1999) 19 Cal.4th 1084, 1088. Accordingly, the only issue cognizable on appeal is appellant's sentence. (*Ibid.*)

The trial court's broad discretion to sentence appellant to five years and eight months in prison may not be disturbed on appeal absent an abuse of discretion. (See

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appellant had received the benefit of *Harvey* waivered counts as a slight factor in aggravation pursuant to rule 4.408 (additional criteria not enumerated in the rules but reasonably related to the sentencing determination is permitted).

[5] The court found the following mitigating factors pursuant to rule 4.423(b)(1) and (2): appellant has a minimal criminal history and considers himself an alcoholic. While giving those factors weight, the trial judge noted that they were "tarnished" because appellant's prior infractions were for driving offenses and because, even if appellant was suffering from a condition that compelled him to drink alcohol, he was not compelled to drive a car.

People v. Carmony (2004) 33 Cal.4th 367, 374.) To constitute an abuse of discretion, the trial court's decision must be so irrational or arbitrary that no reasonable person could agree with it. (*Id.* at p. 377.)

The trial court's selection of the middle term is presumptively correct. (Pen. Code, § 1170, subd. (b) ["[w]hen a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime"].) To determine whether the upper or lower term is justified, the sentencing judge may consider aggravating and mitigating factors, as well as any other factor reasonably related to the sentencing decision. (rule 4.420(b).) A sentencing judge may consider the same factors used to deny probation to enhance punishment. (*People v. Bowen* (1992) 11 Cal.App.4th 102, 106.)

Although the trial court considered appellant's minimal, prior criminal history to be a mitigating factor, the court also noted that the nature of appellant's prior infractions evidenced both disrespect for the court system and a dangerous propensity for violating driving laws. The negative effect that imprisonment would have on appellant and his family was also recognized as a mitigating factor but did not outweigh the aggravating factors: appellant dissuaded a witness from reporting the crime, caused great monetary loss to his victim, received the benefit of *Harvey* waivered counts, and had been penalized for driving unlicensed and uninsured on three prior occasions without alteration in his conduct. (See rules 4.421(a)(6), (9) & (b)(2), 4.408; *People v. Harvey, supra,* 25 Cal.3d at pp. 758-759.) The trial judge correctly declined to use the fact that appellant caused serious bodily injury to another person as an aggravating factor, stating that "the aggravating circumstances are considered by the [great bodily injury] enhancement . . . ." (See rule 4.420(c) "[t]o comply with section 1170(b), a fact charged and found as an enhancement may be used as a reason for imposing the upper term only if the court has discretion to strike the punishment for the enhancement and does so.") The trial court's conclusion was neither arbitrary nor irrational, therefore we do not see an abuse of discretion in appellant's sentence.

DISPOSITION

Our independent review of the record reveals no issues that require further briefing. The judgment is affirmed.

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Lambden, J.

We concur:

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Kline, P.J.

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Richman, J.